Rule 10.1, Ariz. R. Crim. P. — Change of Judge for Cause
Revised 12/2009

A party in a criminal case may challenge a judge for cause if the judge is biased or prejudiced against the party. Rule 10.1(a), Ariz. R. Crim. P., provides:

> **a. Grounds**. In any criminal case prior to the commencement of a hearing or trial the state or any defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge.

The State and the defendant have equal right to seek a change of judge because both sides are entitled to a fair trial and imposition of sentencing. *State v. Barnes*, 118 Ariz. 200, 203, 575 P.2d 830, 833 (App. 1978).

Judges are presumed to be unbiased.

Trial judges are presumed to be impartial and free of bias or prejudice. *State v. Medina*, 193 Ariz. 504, 510 ¶ 11, 975 P.2d 94, 100 ¶ 11 (1999); *State v. West*, 176 Ariz. 432, 445, 862 P.2d 192, 205 (1993); *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989). The burden of rebutting this presumption is on the party seeking the change of judge. "To rebut this presumption, a party must set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *Medina, Id*.

Definition of "bias and prejudice."

"Bias and prejudice mean a hostile feeling or spirit of ill will, or undue friendship or favoritism, toward one of the litigants." *State v. Hill*, 174 Ariz. 313, 322, 848 P.2d 1375, 1384 (1993). The fact that a judge may have strong feelings about a case or an opinion about the merits does not mean that the judge is biased and prejudiced and must remove himself from the case. *State v. Fulminante*, 161 Ariz.

237, 247, 778 P.2d 602, 622 (1988); *State v. Myers*, 117 Ariz. 79, 86, 570 P.2d 1252, 1259 (1977); *State v. Peralta,* 175 Ariz. 316, 319, 856 P.2d 1194, 1197 (App. 1993). The fact that the judge has opinions about the case is insufficient:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

State v. Henry, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555-56 (1994). In *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (App. 1996), the Court of Appeals stressed that the defendant must show more than friction between the judge and defense counsel — the defendant must show that the judge's hostility is directed toward the defendant:

> Our review of the record shows no support for defendant's claim of judicial bias. At best, defendant can show only that some antagonism existed between his counsel and the trial judge. This is insufficient to support a recusal motion. "[C]ourts have drawn a sharp distinction between alleged hostility between judge and party and alleged hostility between judge and attorney." Recusal based on the alleged appearance of hostility between an attorney and judge, or bias by a judge against an attorney, is not warranted except in extreme or rare instances. *United States v. Ahmed*, 788 F.Supp. 196, 202 (S.D.N.Y.) (citations omitted), *aff'd,* 980 F.2d 161 (2d Cir.1992); *see also In re Drexel Burnham Lambert, Inc*., 861 F.2d 1307, 1316 (2d Cir.1988), (disqualification of judge must be determined "on the basis of conduct which shows bias or prejudice or a lack of impartiality by focusing on a party, not on counsel"), *cert. denied, Milken v. S.E.C.*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989). *Id*. at 631, 931 P.2d at 1141. But a defendant cannot entitle himself to have the judge disqualified by acting "deliberately and with an ulterior motive in such a way as to cause the judge to become biased and prejudiced against that party." *State v. Jeffers*, 135 Ariz. 404, 428, 661 P.2d 1105, 1129 (1983). Jeffers had mail-order firms send numerous items to the trial judge, then claimed that the judge was prejudiced against him. The Arizona Supreme Court found no bias or prejudice, stating, "This kind of conduct should not be rewarded." *Id*.

Disagreements over the judge's rulings are insufficient to support a claim of bias or prejudice. *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996). Nor are "expressions of impatience, dissatisfaction, annoyance, and even anger, that is within the bounds of what imperfect men and women . . . sometimes display," sufficient to show bias or prejudice. *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky, supra,* 510 U.S. at 555 [ellipsis in original]. The fact that a judge presided over a codefendant's trial does not per se disqualify a judge. *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, 912 (App. 2006).

Defendants do not have a right to question the judge.

Defendants do not have any constitutional "right to question a judge regarding possible bias or prejudice." *State v. Medina*, *id*. at ¶ 12; *State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987). Permission to question a judge about possible bias or prejudice must be granted sparingly and only in the presence of specific, concrete allegations, not based on speculation, suspicion, apprehension, or imagination. Otherwise, judges would be continuously vulnerable to frivolous attacks. *Id*.

A motion for change of judge must be filed within ten days of discovering grounds for a change of judge.

The moving party must file a motion for a new judge within ten days of discovering the grounds for a change of judge. Rule 10.1(b) provides in part:

> **b. Procedure**. Within 10 days after discovery that grounds exist for change of judge, but not after commencement of a hearing or trial, a party may file a motion verified by affidavit of the moving party and alleging specifically the grounds for the change.

Rule 10.1(b) "is properly interpreted to mean that a motion for change of judge for cause is deemed timely filed only if filed within ten days after discovery of

the grounds for the change." *State v. Myers*, 117 Ariz. 79, 87, 570 P.2d 1252, 1260 (1977), *cert. denied*, 435 U.S. 928 (1978). In *State v. Mincey,* 141 Ariz. 425, 443, 687 P.2d 1180, 1198 (1984), the Arizona Supreme Court stated the reason for the time limit:

> While we will not allow purely "technical" arguments to constitute waiver of the right to a change of judge, *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979), the imposition of a time limit by rule of this Court is not just a "technical" requirement. It is a realistic provision necessary for the efficient and prompt determination of allegations of bias.

In the absence of a timely motion for change of judge**, "**a recusal for bias is discretionary with the trial judge." *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989).

The defendant must support his motion with an affidavit setting out the basis for his claim.

A party moving for a change of judge for cause must file a written motion and support the motion with an affidavit setting forth specific grounds. *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989); *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1131 (App. 1996). Oral statements in court are insufficient to satisfy the "specificity" requirement of Rule 10.1(b), Ariz. R. Crim. P.; *Carver, Id.*

Hearing on motion for change of judge for cause.

Rule 10.1(c), Ariz. R. Crim. P., provides the procedure for a hearing on a motion for change of judge for cause:

> **c. Hearing**. Promptly after the filing of the motion, the presiding judge shall provide for a hearing on the matter before a judge other than the judge challenged. The hearing judge shall decide the issues by the preponderance of the evidence and following the hearing, shall return the matter to the presiding judge who shall as quickly as possible assign the action back to the original judge or make a new assignment, depending on the findings of the hearing judge. If a new assignment is to be made it shall be made in accordance with the provisions of this rule.

In *State v. Eastlack*, 180 Ariz. 243, 254-55, 883 P.2d 999, 1010-11 (1994), the Arizona Supreme Court clarified the meaning of this subsection, explaining that no hearing is necessary unless the defendant has stated a colorable claim of bias or prejudice:

> Although Rule 10.1(c) commands that "the presiding judge shall provide for a hearing" after the filing of the motion, this subsection does not require the presiding judge to hold a hearing when the motion fails to allege interest or prejudice on the part of the assigned judge. It is defendant's responsibility to allege and prove interest or prejudice. In *State v. McCall*, 160 Ariz. 119, 770 P.2d 1165 (1989), we addressed the issue of whether the trial court erred in denying, without an evidentiary hearing, defendant's petition for post-conviction relief, which alleged that the sentencing judge was mentally incompetent. In affirming the denial, we stated that "[a] defendant is entitled to an evidentiary hearing if his petition presents a 'colorable claim[,]' . . . [which] exists when the facts alleged by the defendant in support of his claim, if taken as true, would entitle the defendant to relief." *Id*. at 129, 770 P.2d at 1175. We adopt this same standard for purposes of Rule 10.1(c). Judges are required to grant a hearing only when a defendant's motion alleges facts which, if taken as true, would entitle the defendant to relief. We will not require presiding judges to hold meaningless hearings when no grounds for relief are stated in the first instance.

If the defendant's motion for change of judge sets out a colorable claim of bias or prejudice, a different trial court judge hears the matter and determines if the defendant proved the bias or prejudice by a preponderance of the evidence. *Eastlack*, *id.* If the defendant has met his burden of proof, he will be granted a change of judge. If he has not met his burden, the case will proceed with the original trial judge.